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EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 02279

CASE NBR 85-1-00459 CFX
SHORT TITLE Mellon Bank, et al.
VERSUS United States

DOCKETED: Sep 13 198

Date	Proceedings and Orders
Sep 13 1985	Petition for writ of certiorari filed.
Oct 16 1985	Order extending time to file response to petition until November 17, 1985.
Nov 18 1985	Order further extending time to file response to petition until December 17, 1985.
Dec 18 1985	DISTRIBUTED. January 10, 1986
Dec 19 1985	Brief of respondent United States in opposition filed.
Jan 21 1986	REDISTRIBUTED. January 24, 1986
Feb 7 1986	REDISTRIBUTED. February 21,1986.
Feb 24 1986	Petition DENIED. Dissenting opinion by Justice O'Connor with whom Justice Blackmun and Justice Powell join. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

85-459

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

MELLON BANK, N.A., and ROBERT B. REED, JR.,
Executors of the Estate of A. Leon Davis, a/k/a
Austin L. Davis, Deceased,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WILLIAM McC. HOUSTON, ESQUIRE
JOHN F. MECK, ESQUIRE
HOUSTON, HOUSTON
& DONNELLY
2510 Centre City Tower
Pittsburgh, Pennsylvania 15222
412/471-5828

QUESTIONS PRESENTED

Decedent bequeathed $371,000.00 to a public, non-profit cemetery without church affiliation, which performs the same functions as a church affiliated cemetery in providing and maintaining a place for the burial of the dead. The Internal Revenue Service (the "Service") denied an estate tax charitable deduction for the bequest under Section 2055(a)(2) of the Internal Revenue Code.

1. Is a public, non-profit cemetery, organized for charitable purposes in the common-law sense, also "charitable" for the purposes of Section 2055(a)(2)?

2. Does the Service violate the Establishment Clause in its *application* of facially-neutral Section 2055(a)(2) when it allows a charitable deduction for bequests to church affiliated cemeteries, though it denies the same benefit to bequests to public, non-profit cemeteries?

3. Does the Service violate the equal protection concerns of the Due Process Clause in its *application* of facially-neutral Section 2055(a)(2) when it allows a charitable deduction for bequests to church affiliated cemeteries and denies the same benefit to bequests to public, non-profit cemeteries although, as the Government admits, public policy supplies no reason for the distinction?

PARTIES

All parties are listed in the caption.

Mellon Bank, N.A., is a party solely in its fiduciary capacity as an executor of an estate and thus has not listed any subsidiary or affiliate.

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TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit does not yet have an official citation. A copy of the opinion is Appendix A.

The opinion of the United States District Court for the Western District of Pennsylvania is reported officially at 590 F. Supp. 160 (1984) and unofficially at 84-2 USTC ¶13,593. A copy of the opinion is Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 21, 1985. A timely Petition for Rehearing Before the Original Panel Only was denied on June 18, 1985, and this Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Code, Title 26 (Internal Revenue Code of 1954 as amended)

Section 2055. Transfers for Public, Charitable, and Religious Uses.

> (a) IN GENERAL—For purposes of the tax imposed by Section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises or transfers—
>
> * * *
>
> (2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the

encouragement of art, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidiate for public office.

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

United States Constitution, Amendment XIV:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

The pertinent facts are not disputed.[1] A. Leon Davis died testate on December 6, 1976. His will bequeathed to The Verona Cemetery in Oakmont, Pennsylvania, the residue of his estate, $30,000.00 of which was to be applied to the erection of a new utility building and nondenominational chapel (R.17), and the balance to go to the cemetery's Endowment Fund. Davis's executors filed a Federal Estate Tax return for the estate, paid the tax, and then filed a claim asserting a charitable deduction of $370,901.74 (the amount distributed to The Verona Cemetery), and claiming a tax refund of $97,557.15, plus interest. The Internal Revenue Service disallowed the charitable deduction and denied the claim for refund. After exhausting administrative remedies, the executors filed this action for a refund.[2] All facts were stipulated.[3] The Government and the estate filed cross-motions for summary judgment, and the district court granted summary judgment for the estate. Appendix B. The Government appealed to the Court of Appeals for the Third Circuit. R. 104. The Third Circuit reversed the district court and granted summary judgment to the Government. Appendix A.

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[1]The opinion of the Court of Appeals for the Third Circuit concisely sets forth both the facts and history of the case and is repeated here with some modifications and additions. Record citations highlight the modifications and additions.

[2]The District Court had jurisdiction over this case pursuant to 28 U.S.C. Section 1346. The Government's appeal to the Third Circuit was based on 28 U.S.C. Section 1291.

[3]Stipulation of Facts. R.13-86.

The Verona Cemetery Association was established by nearby residents in 1881 as a non-stock, nonprofit corporation for the purpose of providing burial space to any person regardless of religion or race.[4] The cemetery consists of approximately 8.5 acres, most of which are used for 8,400 burial plots. All of the lots have been or soon will be sold. There are also some general utility buildings, a nondenominational chapel, and a centrally located Civil War Memorial, at which public Memorial Day services are held annually. The community treats The Verona Cemetery as if it were publicly owned. R. 17.

The Verona Cemetery is not owned by or affiliated with any religious group or governmental unit. The Government stipulated that a church affiliated cemetery and The Verona Cemetery render the same functions in providing and maintaining a place for the burial of the dead. R. 24.

The cemetery receives revenues from the following sources: sale of grave sites; grave openings; a charge for the Endowment Fund of $150.00 per grave site; and other miscellaneous sources. The Endowment Fund has been used exclusively for the maintenance and upkeep of The Verona Cemetery. Excess revenues, if any, are regularly transferred to the Endowment Fund. Without the bequest from Petitioners' estate, the Endowment Fund would have been fully depleted in approximately ten years, since virtually all the graves have been sold and the income of the Endowment Fund would not cover expenses. Thereafter a public contribution campaign or municipal assumption of

[4]None of the assets and no part of the net earnings have or may inure to the benefit of any private individual, corporation or lot owner and the cemetery does not attempt to influence legislation or take part in any political activity. R. 14-15

the operating costs and responsibilities would have been the only alternative to abandonment of the cemetery. R.21-22.

The early history of the cemetery's treatment of indigents is unknown. In recent years, there has been no established practice either authorizing or denying free or reduced rate services for indigents, and no request for such services has been made. The cemetery has, on occasion, provided grave openings and has not been paid because of an alleged lack of funds. The cemetery has been found to be an exempt organization for purposes of the Federal Income Tax, state sales tax, and county and local real estate taxes. The cemetery also qualifies as a charitable organization for purposes of the Pennsylvania Inheritance Tax Act.[5]

ARGUMENT

This Petition for Certiorari is filed on behalf of a public, non-profit cemetery, which is dismayed: 1) by the position of the Internal Revenue Service that only church owned or affiliated cemeteries can enjoy the extra dollars and gift incentives that an estate tax deduction generates, even though public non-profit cemeteries provide the same services and operate in precisely the same manner;[6] 2) by the judicial conclusion that Congress actually intended this inequitable, inexplicable, and anomalous result; and 3) by the failure of the court of appeals to determine if The Verona Cemetery is "charitable" within the requirements

[5]The Court of Common Pleas of Allegheny County, Commonwealth of Pennsylvania, Orphans' Court Division, allowed a charitable deduction for the bequest for purposes of the Pennsylvania Inheritance Tax. The opinion of the court is at R.53-68 and is Appendix C.

[6]*Estate of Audenreid*, 26 T.C. 120 (1956), acq., 1956-2 Cum. Bull. 4; Rev. Rul. 67-170, 67-1 Cum. Bull. 272.

of Section 2055(a)(2) of the Internal Revenue Code, even though the court observed that this question is the sole issue presented by the case.

The issues here are neither new nor unique. This Petition culminates a long series of cases dating back as far as 1928[7], which are noteworthy for their persistent refusal to apply to public cemetery bequests pronouncements of this Court and of the Internal Revenue Service itself as to what is charitable; for their superficial analysis of legislative history; and for their seeming lack of concern for results which defy logic and the Constitution. While there have been some recent breaks[8], a majority of the Third Circuit panel would let these aberrations continue. The time has come to cut this knot once and for all.

Chief Judge Aldisert is correct that the Republic will not necessarily fall on an improper resolution of this estate tax deduction issue. But many of the thousands of public cemeteries could rise or fall because of it. As in the case of The Verona Cemetery, the difference between their future solvency and insolvency may well be the extra estate tax dollars assessed on bequests failing to qualify for an estate tax deduction. Even more crucial to their welfare is the

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[7]*Craig v. Commissioner*, 11 B.T.A. 193 (1928); *Wilber National Bank v. Commissioner*, 17 B.T.A. 654 (1929); *Gund's Estate v. Commissioner*, 113 F2d 61 (6th Cir. 1940), *cert. denied*, 311 U.S. 696 (1940); *Bank of Carthage v. U.S.*, 304 F. Supp. 77 (W.D. Mo. 1969); *Child v. U.S.*, 540 F2d 579 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1029 (1977); *First National Bank of Omaha v. U.S.*, 681 F2d 554 (8th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Smith v. U.S.*, 84-2 USTC ¶13545 (W.D. Mo. 1984).

[8]Dissent of Circuit Judge Anderson in *Child*; Opinion of Judge McCune in the district court below, Appendix B; dissent of Chief Judge Aldisert in the court below, Appendix A. See also Opinion of Administrative Judge Zavarella in the Court of Common Pleas of Allegheny County, Orphans' Court Division, Appendix C.

presence or absence of tax incentive for making gifts to these organizations. The recent tax reform debates have reemphasized the economic importance to charitable organizations of the tax motivation on the number and size of gifts.

Public cemeteries are not the most glamorous of charitable objects.[9] They certainly can ill afford an illogical and discriminatory adverse tax tilt. If not reversed now, the abuse is not likely to see any future challenges. The remedy is at hand.

STATUTORY CONSTRUCTION

With one exception, there has been complete unanimity among this Court[10], state appellate courts[11], text writers[12], and the Restatement of the Law of Trusts (Second)[13] that public, non-profit cemeteries are "charitable." See Appendix C. The exception has been the intransigence of the Internal Revenue Service and the aforementioned decisions denying estate tax charitable deductions for bequests to such cemeteries. In this area, they have marched to their own drummer. They have viewed as fatal the fact that cemeteries sold lots, as though *Trinidad v. Sagrada Orden*, 263 U.S. 578 (1924), had never been decided. Equal opprobrium was heaped on the failure to provide free grave sites for paupers long after the Service did an about face in 1959

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[9]The bequest in this case of approximately $371,000 and that in *Child*, of $2,500,000 have to be viewed as exceptional.

[10]*Hopkins v. Grimshaw*, 165 U.S. 342, 352 (1895).

[11]*Estate of Edwards*, 88 Cal. App. 3rd 383, 151 Cal. Rptr. 770 (1979) (cemetery bequest held charitable for state inheritance tax); *Parker v. Fidelity Union Trust*, 2 N.J. Super 362, 63 A.2d 902 (1944) (cemetery bequest held charitable for rule against perpetuities).

[12]*Scott on Trusts*, 3rd Edition, Section 124.2, p. 948; Bogert, *Trusts and Trustees*, (1935) Section 377, p. 1195.

[13]Section 374, Comment (h).

and by Regulation[14] adopted, without qualification, the common law definition of charity as expressed in the Restatement of the Law of Trusts which eliminates relief of paupers as a controlling test for what is charitable. The Government advanced neither argument in its Third Circuit briefs—perhaps a refreshing signal that for the first time in this long succession of cemetery cases, it is ready to return to the mainstream at least to this limited extent.

Whatever doubt may have existed in the past as to the definition of charity has been eliminated by the "enlightened" 1959 modification of the Regulations under Section 501(c) of the Internal Revenue Code and *Bob Jones University v. United States*, 461 U.S. 574 (1983). These have swept away the precedential value of cemetery estate tax deduction cases cited above. The Verona Cemetery relieves the public fisc, maintains public records, promotes health, provides a chapel for religious burial services, maintains a public structure and war monument, encourages patriotism and combats community deterioration. No one can now seriously deny that The Verona Cemetery is charitable and thus deserving of the estate tax deduction. In fact, the Government in the Third Circuit did not even attempt to challenge The Verona Cemetery's ability to meet the common law definition of charity.

The majority opinion (in a footnote-Appendix A, p. 7a) declined to address what should have been the *sole* issue in this case—does The Verona Cemetery meet the

[14]Reg. Sec. 1.501(c)(3)-(1)(d)(2).

requirements of Section 2055 of the Code? Is it a corporation "organized and operated exclusively for . . . charitable . . . purposes . . . "?[15]

The court of appeals denied an estate tax charitable deduction because it drew erroneous analogies from provisions of the income tax side of the code—Section 501(c) (listing organizations exempt from income tax) and Section 170 (listing organizations to which deductible gifts can be made).

The majority opinion concluded that since cemeteries are specifically referred to in Section 501(c)(13), they cannot also qualify under Section 501(c)(3). Thus, the opinion inferentially reads into Section 501(c)(3) and Section 2055, its estate tax "twin", a cemetery exception to the statutory reference to "charitable" organizations. This exception is not apparent on the face of either section. This inevitably brings into focus the issue on which the majority and dissent disagree—how to explain or cope with the inconsistency of an express allowance, granted for the first time in 1954, of an income tax deduction for lifetime gifts to a Section 501(c)(13) type cemetery and no similar express statutory provision for an estate tax deduction for bequests thereto. This dilemma was unnecessary for two reasons.

First: The court of appeals makes the fatal assumption that all non-profit cemeteries are of the same breed. The

[15]In each of the cases on which the Government relies—*Child v. U.S.*, 540 F2d 579 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); *Gund's Estate v. Comm.*, 113 F2d 61 (6th Cir. 1940), *cert. denied*, 311 U.S. 696 (1940); and *First National Bank of Omaha v. U.S.*, 681 F2d 554 (8th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983)—the Second, Sixth and Eighth Circuit Courts of Appeals undertook this analysis of whether or not the cemetery in question met the requirements of Sections 501(c)(3) (and thus Section 2055) as well as Section 501(c)(13).

predecessors of Section 501(c)(13), from their very inception in 1913, granted tax exemption to cemetery organizations that could not possibly meet the more stringent charitable requirements of Section 501(c)(3). Before 1921, the exemption was limited to a cemetery operated for the benefit of its *members*. The Code as amended in 1921 exempted "non-profit cemeteries", which were construed to include non-charitable cemeteries operated solely for particular families. *See Rockefeller Family Cemetery Corp.*, 63 TC 355 (1974), acq., 77-2 Cum. Bull. 2, which embodies a comprehensive discussion of the legislative history. *See also DuPont deNemours Cemetery*, 33 TCM 1438 (1974). That Congress later saw fit to endow these exempt private operations with an additional tax benefit in 1954—income tax deductibility for contributions—without conferring a comparable estate tax deduction has no logical bearing on Congressional intent with regard to organizations which are clearly charitable. Express income tax breaks for donations to the Rockefeller and Dupont *private*, albeit non-profit, family cemeteries are hardly the stuff from which one can logically infer an intent to deny estate tax deductions for bequests to *public*, non-profit cemeteries. This is a quantum leap in statutory construction. It deserves review.

Second: The income tax/estate tax dichotomy itself is born of the court of appeals's implicit assumption that each of the subsections of 501(c) is mutually exclusive. The dichotomy disappears once one recognizes that they are not. There is nothing in Section 501(c) which warrants the conclusion that organizations cannot enjoy exempt status under more than one subsection. The Verona Cemetery can be "charitable" as required by Section 501(c)(3) and "non-profit" as less restrictively required in Section

501(c)(13). Similarly, the Legal Aid Society, for example, can be "charitable" under Section 501(c)(3) and still be an organization "operated exclusively for the promotion of social welfare" under the less restrictive Section 501(c)(4). There is neither statutory nor logical excuse for relegating The Verona Cemetery or the Legal Aid Society to the less restrictive category, if that means loss of estate tax deductibility of contributions to the former or income tax deductibility of contributions to the latter. In fact, most Section 501(c)(3) organizations would also meet the "promotion of social welfare" test of Section 501(c)(4). The whole concept of charitable deductions would be ultimately eliminated if this conformance to Section 501(c)(4) were permitted to taint tax benefits otherwise available to organizations also meeting the criteria of Section 501(c)(3). Whether intentionally or through oversight, Congressional failure to expressly grant an estate tax deduction for gifts to private or family cemeteries which can only meet the test of Section 501(c)(13), does not and should not preclude a truly "charitable" cemetery from enjoying the fruits of an exempt bequest when it can meet the more restrictive test of Section 501(c)(3) and its counterpart, Section 2055.

CONSTITUTIONAL ISSUES[16]

Establishment Clause. The court of appeals seems to have misapprehended the thrust of Petitioners' First Amendment concerns. Petitioners recognize that Congress

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[16]The constitutional arguments were briefed by both Petitioners and the Government in the district court and the Third Circuit. The district court did not need to address these issues given its interpretation of the statutory language. The Third Circuit necessarily addressed both issues because it rejected the district court's interpretation of the statutory language.

may properly accord a tax exemption to religious organizations and allow tax deductions to their contributors.

Here, however, the Service draws an invidious distinction between non-profit, public cemeteries and church related cemeteries. Both have comparable sepulchral operations. Both have comparable religious burial services. The sole distinction is the identity of the owner. A tax "subsidy" or benefit thus confined to a church cemetery and denied to its secular counterpart is an unabashed and impermissible advancement of religion.

The court of appeals inappropriately relies on *Walz v. Tax Commission*, 397 U.S. 664 (1970). Estate tax preference for bequests to church cemeteries does not enjoy the historical countenance of church real estate tax exemptions. Moreover, the exemption in *Walz* extended to broad and divergent organizations, all contributing to the moral, cultural, spiritual and mental improvement of mankind. Churches constituted only one of these groups and thus the requisite neutrality was preserved. This cemetery distinction lacks this breadth. Of all cemeteries only church related ones are accorded the tax benefits. The primary effect is a blatant advancement of religion.

With guideposts like *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) and *Mueller v. Allen*, 463 U.S. 388 (1983), it is evident that government aid or subsidy extended to church related parochial schools, for example, but denied to secular private and public schools, could not possibly pass muster. Yet a fully comparable identity of function, line of demarcation as to ownership, and disparity of aid exists here with the favorable tax status accorded church related cemeteries.

Nor does *Nyquist* demand that these constitutional infirmities be cured by denial of the tax benefits to church related cemeteries rather than allowance of those benefits to public, non-profit cemeteries. The offending statute in *Nyquist* on its face limited benefits to private schools which this Court recognized were predominantly religiously affiliated. Thus the only remedy available was to invalidate the statute. This Court could not create a statute to cover the public side where none previously existed. Here, however, Section 2055 is neutral on its face and it is the *application* of the Service that creates the constitutional infirmity by selectively denying deductibility for bequests to public, non-profit cemeteries.[17] Thus the remedy is to proscribe the Service's policy of denial and permit the Code to operate on all cemeteries meeting the "charitable" test. Elimination of an otherwise valid exemption for church related cemeteries is not the proper remedy when the objectionable aspect is the erroneous denial of a comparable exemption for public, non-profit cemeteries. If you have a splinter in your eye, you remove the splinter, not the eye.

Equal Protection. The Government stipulated that a church affiliated cemetery and The Verona Cemetery render the same functions in providing and maintaining a place for the burial of the dead. Moreover, religious burial services conducted by loved ones, which occur in *all* cemeteries, are unrelated to the true focus of §2055(a)(2)—how a cemetery is "organized and operated". Regardless of the

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[17]Currently before this Court is *Witters v. State of Washington*, No. 84-1070, Oct. Term 1984, which is apparently scheduled for oral argument in November. It is the converse of this case, i.e., neutral statute administratively applied to deny vocational benefits only to applicants seeking to finance a course of religious study.

type of equal protection analysis,[18] the Service's distinction based on church affiliation violates the equal protection concerns of the Due Process Clause of the Fifth Amendment.[19]

The court of appeals (like the Second Circuit in *Child)* recognized that this distinction, insisted upon by the Service, is at best a statutory anomaly. The Government advanced no policy reason or purpose to justify this distinction. The legislative history sheds no light on this matter. (Chief Judge Aldisert, dissent below, Appendix A, p.10a). Without a purpose to evaluate, both for its legitimacy and as to whether it is furthered by the challenged distinction, the distinction cannot pass any level of constitutional equal protection scrutiny, given its irrational impact on thousands of public non-profit cemeteries.

Circuit Judge Sloviter borrows the First Amendment test of non-entanglement as the "purpose" warranting a church/public cemetery distinction under the Fifth Amendment. Appendix A, p.9a. Her reliance on *Walz* for this purpose is wholly unwarranted. *Walz* found non-entanglement in the blending of religious activity with a number of different secular activities rather than creating a separate category for religion. Here the Service has created a separate religious category, which is unconstitutional.

The Service has created a fixed, permanent distinction between classes despite their identical functions. This

[18]This Court's recent decision in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 45 CCH S. Ct. Bull. p.B4644 (No. 84-468, decided July 1, 1985), illustrates the debate in this area. *Hooper v. Bernalillo County Assessor*, 45 CCH S.Ct. Bull. p.B3954 (No. 84-231, decided June 24, 1985); *Zobel vs. Williams*, 457 U.S. 55 (1982).

[19]Circuit Judge Anderson, dissenting in *Child*, contended that such a distinction "is manifestly arbitrary, unfair and unjust and does not afford equal protection of the law." 540 F.2d at 585.

church cemetery subset has no more validity than the mentally retarded group home occupants subset of *Cleburne* or the veteran subset of *Hooper*. In each case no "impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Cleburne,* (Stevens, J. concurring, 45 CCH S.Ct. Bull. at p.B4665).

If *certiorari* is not granted, the inequities spawned by *Child* and its predecessors and reluctantly adhered to below "will be with us forever". (Aldisert dissent, Appendix A, p.12a)

Respectfully submitted,

HOUSTON, HOUSTON
& DONNELLY

By .....

By .....
Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3541

Mellon Bank, N.A. and Robert B. Reed, Jr.,
Executors of the Estate of A. Leon Davis
a/k/a Austin L. Davis, Deceased

v.

United States of America,
Appellant

ARGUED MARCH 28, 1985
BEFORE: ALDISERT, CHIEF JUDGE,
SLOVITER AND STAPLETON, CIRCUIT JUDGES

OPINION

SLOVITER, Circuit Judge MAY 21, 1985

We must determine whether a bequest to a nonprofit cemetery was deductible for estate tax purposes as a bequest to an organization operating exclusively for "charitable" purposes under section 2055(a)(2) of the Internal Revenue Code.

The pertinent facts are not disputed. A. Leon Davis died testate on December 6, 1976. His will provided that the residue of his estate was to be distributed to the Verona Cemetery, Oakmont, Pennsylvania, of which $30,000 was to be applied to the erection of a new utility building, with the balance to go to the cemetery's endowment fund. Davis' executors filed a Federal Estate Tax return for the estate, paid the tax, and then filed a claim asserting a charitable deduction of $370,901.74 (the total amount distributed to the Verona Cemetery), and claiming a tax

refund of $97,557.15, plus interest. The Internal Revenue Service disallowed the charitable deduction and denied the claim for a refund. After exhausting administrative remedies, the executors filed this action for a refund. All facts were stipulated. The government and the estate filed cross-motions for summary judgment, and the district court granted summary judgment for the estate. The government appeals.

The Verona Cemetery Association was established by nearby residents in 1881 as a non-stock, nonprofit corporation for the purpose of providing burial space to any person regardless of religion or race. It is not owned by or affiliated with any religious group or governmental unit. The cemetery consists of approximately 8.5 acres, most of which are used for 8,490 burial plots, all of which have been or soon will be sold. There are also some general utility buildings, a nondenominational chapel, and a centrally located Civil War Memorial, at which Memorial Day services are held annually.

The cemetery receives revenues from the following sources: sale of grave sites; grave openings; an endowment charge of $150.00 per grave site for deposit in the Endowment Fund; annual mowing charges for grave sites on which no endowment charge was imposed at the time of sale; charges for headstone foundations; two privately established trusts which generate approximately $400.00 a year; a small charge for burial of cremation ashes; and a $10.00 deed and endowment charge when a lot owner conveys directly to a third party. The early history of the cemetery's treatment of indigents is unknown. In recent years, there has been no established practice either authorizing or denying free or reduced rate services for indigents,

and no request for such services has been made. The cemetery has, on occasion, provided grave openings and not been paid due to an alleged lack of funds. The cemetery has been found to be an exempt organization for Federal Income Tax purposes, state sales tax, and county and local real estate taxes, and also qualifies as a charitable organization for purposes of the Pennsylvania Inheritance Tax Act.

The pertinent provisions of the Internal Revenue Code of 1954 allows a deduction from the taxable estate of bequests:

> to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private stockholder or individual, which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in . . . any political campaign on behalf of any candidate for public office

26 U.S.C. § 2055(a)(2)(1982). The sole question on appeal, as below, is whether the cemetery is a "corporation organized and operated exclusively for . . . charitable . . . purposes."

The district court held that the bequest to the Verona Cemetery did qualify for a deduction under § 2055(a)(2). The court recognized that the weight of case precedent favored the government, but stated that language in the Supreme Court's recent decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983), required reevaluation of that view. There, the Supreme Court, in considering the tax status of a university as a charitable institution under an income tax provision, 26 U.S.C. § 501(c)(3) (1982),

stated that in order for an organization to be entitled to tax-exempt status it must meet "certain common-law standards of charity", that is, it "must serve a public purpose and not be contrary to established public policy." *Id.* at 586.

The district court read this language expansively stating that the "contemporary view of 'charity' considers the benefit to the community as a whole." The court then stated, "The maintenance of cemetery facilities by cemetery associations benefits the community both through its aesthetic effects and by the performance of a necessary social task." Additionally, the court noted that if the cemetery were to become insolvent, the burden of maintaining it would fall on the borough. Pa. Stat. Ann. tit. 53, § 47804 (Purdon 1966). Therefore, the district court concluded that public nonprofit cemeteries are charitable organizations because of the important social function they perform and the concurrent lessening of the burden of the public fisc.

Although the executors argue that the *Bob Jones University* case requires that we construe the word "charitable" by looking to the common law concept of charity, we believe we are not free to do so in light of the framework of the Internal Revenue Code, and its treatment of "charitable" organizations.

Section 501(c)(3), the provision at issue in the *Bob Jones University* case, deals with those organizations that are exempt from taxation for income tax purposes. Deductibility of contributions made to such organizations is covered in section 170 which provides that a taxpayer who makes contributions to the organizations covered by section 501(c)(3) may deduct those contributions for income tax purposes. Thus "charitable" organizations are

exempt from taxation under section 501(c)(3) and contributions to "charitable" organizations are deductible from the taxpayer's income under section 170(c)(2)(B).

Other subsections of those statutory sections provide explicitly for nonprofit cemeteries, thus suggesting that such organizations are not encompassed within the meaning of "charitable" organizations. Section 501(c)(13) provides separately for exemption from income tax for:

> [c]emetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

26 U.S.C. § 501(c)(13) (1982). This exemption has been independent from that for "charitable" organizations since 1913. *See* The Tariff Act of 1913, ch. 16, 38 Stat. 114, 172; Revenue Act of 1921, ch. 136, 42 Stat. 227, 253.

There was no specific provision for deduction for income tax purposes of contributions to cemetery companies until 1954. At that time, as part of the general revision of the Internal Revenue Code, section 170(c)(5) was added to permit deduction of contributions to cemetery companies meeting the same description as set forth in Section 501(c)(13). The Senate Report on the 1954 Code stated that this amendment "*extended[ed] the deduction* for charitable contributions beyond those allowed under present law to contributions made to nonprofit cemetery and burial companies." Senate Finance Comm., Report on Internal Revenue Code of 1954, 83d Cong., 2d Sess.

reprinted in 1954 U.S. Code Cong. & Ad. News 4621, 4660 (emphasis added).

In contrast to the legislative treatment of cemetery companies for income tax purposes, the estate tax provision dealing with deductions to "charitable" organizations, 26 U.S.C. § 2055(a)(2), was never specifically "extended" to cover cemetery companies. Thus, it is implausible to construe section 2055(a)(2) to cover a situation which required an amendment to an almost identical parallel provision in the income tax sections to reach that result. Congress' inaction with respect to the estate tax provision is particularly probative given the established case law prior to 1954 denying a deduction for contribution to cemeteries for estate tax purposes. *See Gund's Estate v. Commissioner*, 113 F.2d 61 (6th Cir.), *cert. denied*, 311 U.S. 696 (1940); *Wilber National Bank v. Commissioner*, 17 B.T.A. 654 (1929). *See also Craig v. Commissioner*, 11 B.T.A. 193 (1928) (not deductible for income tax purposes); *Schuster v. Nichols*, 20 F.2d 179 (D. Mass. 1927) (same).

As one court has noted, the absence of a counterpart of income tax section 501(c)(13):

> illustrates if anything, an intent by Congress not to include as an estate tax exemption, the exemption set out in Section 501(c)(13) to estate tax situations. Cf. Hopkins v. Grimshaw, 165 U.S. 342, 353, 17 S.Ct. 401, 41 L.Ed. 739. It is exclusively the province of Congress in its wisdom to determine whether it wishes to provide in its estate tax statutory exemptions all those appearing in its statutory income tax exemptions.

Bank of Carthage v. United States, 304 F. Supp. 77, 81 (W.D. Mo. 1969).

The government suggests no reason why Congress would have chosen to treat deductions to cemetery organizations differently for income and estate tax purposes. As the Second Circuit recognized, Congress has wrought an "anomaly" by "establishing different treatment of nonprofit cemetery associations for income and estate tax purposes," but, like that court, we leave this anomaly to "congressional wisdom." *Child v. United States*, 540 F.2d 579, 584 (2d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977). It may be that such "anomalies" are inevitable in any body of statutory law as complex as the Internal Revenue Code. As the Supreme Court has noted "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983). Whether the "anomaly" brought to our attention in this case was intentional or an oversight, it is not for us to amend the statutory language to provide for deductions for bequests to nonprofit cemetery associations when Congress has failed to do so.[1]

Finally we need to consider only briefly the executors' argument that disallowance of this deduction when it would be allowed for a deduction to a church-related cemetery violates the establishment clause of the First Amendment and the equal protection guarantees of the Fifth Amendment. The parties agree that the establishment clause issue must be addressed in light of the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971):

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[1]Because we find the legislative history and framework dispositive, we need not decide whether, under an independent analysis, we would regard the activities of a non-profit cemetery to be "charitable". *But see* First National Bank v. United States, 681 F.2d 534, 540-41 (8th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive government entanglement with religion."

The executors argue that, as applied, section 2055(a)(2) has the "primary effect" of advancing religion, thus falling under the second part of the *Lemon* test.

A similar argument was presented to the Supreme Court in *Walz v. Tax Commission of New York*, 397 U.S. 664, 675 (1970), dealing with the tax exempt status of religious organizations. The Court recognized that "[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion". *Id.* at 674. Nonetheless, the Court upheld the constitutionality of property tax exemptions for religious organizations, after consideration of the untoward effect of abolishing the exemption. The Court found that exemption not only minimizes the entanglement of the state in religion, *id.* at 676, but has proven historically to pose no danger of encouraging the establishment of religion, *id.* at 676-80.

We believe that the Court would find the same reasoning applicable to a statutory scheme permitting the deductibility of contributions to religious organizations. Grant of the deduction for contributions (or, as here, bequests) for organizations devoted exclusively to religious purposes avoids a government inquiry into whether churches were organized for any of the other exempt purposes, *e.g.* whether they were organized for "charitable" purposes, an inquiry that might pose grave dangers to the values fostered by the religion clauses. Also, as did the court in *Walz*, we note that the historical availability of deductions for contributions to religious organizations has not been

shown to foster the establishment of religion. The provisions before us, therefore, are unlike the scheme at issue in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), upon which the executors rely. In that case, the state had established a new system of tax benefits for parents of children attending non-public schools, which was found to advance the sectarian activies of religious schools. This case is governed by the holding in *Walz* where the Court found that the exemption did not violate the establishment clause because there is no "genuine nexus between tax exemption and establishment of religion." 413 U.S. at 675.

Since Congress' statutory treatment of religious organizations, and bequests thereto, can be unpheld on the ground that it avoids entanglement with religion, this constitutes a sufficiently valid basis for the classifications challenged by the executors, and we therefore also reject the executors' equal protection argument.

Moreover, the executors' argument, even if successful, would not redound to their benefit, since at most the deduction permitted for religious affiliated cemeteries would be impermissible. Such a holding would not entitle these executors to the deduction they seek.

For the reasons set forth above, we will reverse the district court's entry of summary judgment for the plaintiffs and direct that judgment be entered for the government.

ALDISERT, Chief Judge, dissenting

The Republic will stand even though this court is divided on what constitutes a deductible bequest for estate tax purposes in a very narrow provision of the Internal Revenue Code of 1954. The majority reasonably interprets

26 U.S.C. § 2055(a)(2) and concludes that a bequest to a non-profit cemetery is not deductible for estate tax purposes. I am not inclined to join in their acceptance of the government's position, because I have not been persuaded that there is a rational justification for this paradox:

- A contribution to a non-profit cemetery is deductible for income tax purposes if you make it during your lifetime.

- A contribution to a non-profit cemetery is *not* deductible for estate tax purposes if you make it by bequest in a will.

The government admits that this does not make much sense. The government concedes that there is no identifiable public policy justification for the distinction. Nevertheless, the government argues that because Congress created this anomaly, Congress also must eliminate it.

The centerpiece of the government's argument is that Congress has enacted a special income tax deduction for contributions to non-profit cemeteries. 26 U.S.C. § 501(c)(13). From this, the government would have us conclude that in 1954 it was the Congressional intention, at that time, to include a deduction for income tax purposes, but not for estate tax purposes.

My own research into the legislative history of the Code, however, indicates that there was no discussion that Congress intended to exclude the deduction for estate tax purposes in 1954. The point simply was not discussed, and at oral argument, the government conceded as much. I agree that § 501(c)(13) was an attempt to clarify the general charitable deduction provision of 26 U.S.C. § 170(c)(2)(B) (contributions to a corporation organized and operated exclusively for charitable purposes) which is the income

tax counterpart to the estate tax statute under interpretation in these proceedings (bequests to a corporation organized and operated exclusively for charitable purposes).

I believe, however, that the 1954 omission for estate tax purposes was a technical drafting oversight, and I argue that the inaction of Congress cannot be construed as an expression of congressional intent when interpreting the meaning of "charitable purposes" in Section 2055(a)(2) which, it must be emphasized, is our primary responsibility today.

Thus, I go back to the language of the general estate tax statute we are called upon to construe. Like District Judge McCune, I turn to the latest teachings of the Supreme Court set forth in *Bob Jones University v. United States*, 461 U.S. 574 (1983), to learn what is a charitable purpose. There the Court said that for a corporation to be entitled to tax exempt status under § 501(c)(3) it had to meet "certain common-law standards of charity," and that this meant that it "must serve a public purpose and not be contrary to established public policy." *Id.* at 586. I believe that the non-profit cemetery here met that purpose both under common law traditions and Pennsylvania tax law. And I believe that what the Supreme Court has said in interpreting the general charitable deduction provision of the income tax statute is equally applicable to the estate tax provision.

In taking a contrary view, the majority seems to recognize the inequity of the result, but would leave "this anomaly to Congressional wisdom." I would not. I would remove this blatant inconsistency now by judicial action. Walter V. Schaefer, the distinguished legal scholar and retired justice of the Illinois Supreme Court, once discussed "the judge's unspoken notion of the function of his

court." He wrote that if a judge "views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not." Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. 3, 23 (1966). In this case, I suppose that I am not passive, because, considering the priorities of the *realpolitik*, I doubt that Congress will get excited enough ever to act on this highly technical problem. I think the courts must act, otherwise the inequities and inconsistencies presented in this case will be with us forever. Accordingly, I would affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 84-3541

Mellon Bank, N.A. and Robert B. Reed, Jr.,
Executors of the Estate of A. Leon Davis
a/k/a Austin L. Davis, deceased

vs.

United States of America, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, *Chief Judge* and SLOVITER and STAPLETON*, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel March 28, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 27, 1984, be, and the same is hereby reversed and the cause remanded to the said District Court with direction that judgment be entered in favor of the government. Costs taxed against the appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS
Clerk

May 21, 1985

*Hon. Walter K. Stapleton, who was Chief Judge, United Stated District Court for the District of Delaware, sitting by designation at the time of argument, has since been appointed to the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 84-3541

Mellon Bank, N.A. and Robert B. Reed, Jr.,
Executors of the Estate of A. Leon Davis
a/k/a Austin L. Davis, Deceased

vs.

United States of America,
Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SLOVITER and STAPLETON*, *Circuit Judges*

This petition for rehearing filed by Appellees, Mellon Bank, N.A., and Robert B. Reed, Jr., Executors of the Estate of A. Leon Davis, a/k/a/ Austin L. Davis, Deceased, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court:

.../s/. DOLORES K. SLOVITER....
Circuit Judge

June 18, 1985

*Hon. Walter K. Stapleton, who was Chief Judge, United Stated District Court for the District of Delaware, sitting by designation at the time of argument, has since been appointed to the Court of Appeals.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Mellon Bank, N.A. and Robert B. Reed, Jr.,
Executors of the Estate of A. Leon Davis
a/k/a Austin L. Davis, Deceased
Plaintiffs

vs.

United States of America,
Defendant

Civil Action No. 82-1939

MEMORANDUM

BARRON P. McCUNE, District Judge
Dated: June 26th, 1984. [Filed June 27, 1984]

The issue before us on cross motions for summary judgment is whether or not the Verona Cemetery, a non-profit corporation, is a "corporation organized and operated exclusively for . . . charitable . . . purposes," under § 2055(a)(2) of the Internal Revenue Code of 1954, as amended.

The plaintiffs have exhausted their administrative remedies. We have jurisdiction pursuant to 28 U.S.C. § 1346.

FACTS

The following facts have been stipulated to by the parties and are therefore not in dispute.

History of the Case

A. Leon Davis died testate on December 6, 1976. His last Will dated October 11, 1972, and a Codicil dated November 21, 1975, provided as follows:

> All of the rest, residue and remainder of my estate I give, devise and bequeath to THE VERONA CEMETERY, Oakmont, Pennsylvania, with the sum of Thirty Thousand Dollars ($30,000.00) thereof to be applied toward the erection of a new utility building and the balance thereof to be added to its Endowment Fund.

On August 22, 1977, the plaintiffs timely filed a federal estate tax return for the Estate of A. Leon Davis and paid taxes owed in the amount of $96,808.16. A deficiency in the amount of $860.32 was subsequently paid on June 19, 1979.

On September 11, 1979, the plaintiffs filed a claim for a refund in the amount of $97,557.15, plus interest, based on a claim for a charitable deduction of $370,901.74. The Internal Revenue Service disallowed the charitable deduction in full and denied the claim for a refund.

The plaintiffs then filed the instant suit claiming that the denial of the deduction was improper and that the resulting Federal Estate Tax was erroneously assessed and collected.

Before addressing the merits of the plaintiffs' claim we will briefly review the history and physical characteristics of the Verona Cemetery based upon the stipulation.

History of the Verona Cemetery

In 1881, residents of the Borough of Verona and several other communities drafted Articles of Association for

a public cemetery. The Association's stated purpose was the maintenance, without profit, of a public cemetery for the burial of the dead, without distinction or regard to sect.

Thereafter, the Court of Common Pleas of Allegheny County was petitioned by the Association's subscribers requesting that a corporation of the first class (non-profit) be established. A decree was entered on January 3, 1882, granting the Charter. The Charter and the rules and regulations have remained unchanged and are still in full force and effect.

The corporation was organized on a non-stock basis and none of the assets and no part of the net earnings of the cemetery have or may inure to the benefit of any private individual, corporation or lot owner. Persons of different races and religions have been buried in the cemetery without any restrictions or distinction whatsoever. The cemetery is operated by a Board of Managers who serve without compensation.

Description of the Cemetery

The cemetery itself occupies approximately 8.5 acres with approximately 8,490 burial plots, all of which have been or soon will be sold.

In the middle of the cemetery there is a circular grass plot where there is erected a flagpole and a monument to the local Civil War dead. On the outside of the circle is a platform erected by the Grand Army of the Republic. Upkeep of these monuments has been performed by employees of the Verona Cemetery without charge.

Annual community Memorial Day services are held each year from the platform. The community regards the Verona Cemetery as publicly owned.

There is also a building located on the grounds which contains a chapel, office and storage rooms. The chapel is used without charge by all religious denominations for funeral services. Prior to the erection of the chapel, the estates or families of decedents had to arrange at their own expense for the rental and erection of a temporary tent to provide shelter for such services.

It is not known whether the cemetery ever provided free, or at a reduced rate, cemetery lots or grave openings to indigents. The cemetery has had no established practice which either authorized or denied such free or reduced rate service to indigents, nor has it ever been requested to provide such services. On several occasions the cemetery has provided grave openings and subsequently has not been paid for this service, allegedly because of lack of funds.

Existing Tax Exemptions

Since July of 1941, the cemetery has been exempt from federal income taxes. The cemetery is also exempt from county and local real estate taxes. There is no realty transfer tax imposed on the sale of grave sites by the cemetery or in a later resale by a private owner. In 1979, the cemetery received a tax exemption for state sales tax. Finally, on November 18, 1982, Administrative Judge Zavarella of the Orphans' Court Division of the Court of Common Pleas of Allegheny County held that the bequest here in dispute was exempt from Pennsylvania Inheritance Tax under § 62 of the Pennsyvlania Inheritance Tax Act because the Verona Cemetery was charitable.

Revenue of the Cemetery

The cemetery receives revenue from the following sources:

(a) the sale of grave sites;

(b) grave openings;

(c) an endowment charge of $150.00 per grave site for deposit in the Endowment Fund;

(d) annual mowing charges for grave sites on which no endowment charge was imposed at the time of sale;

(e) charges for headstone foundations;

(f) two privately established trusts which generate approximately $400.00 a year;

(g) a small charge for burial of cremation ashes; and

(h) a $10.00 deed and endowment charge where a lot owner conveys directly to a 3rd party.

Merits of Plaintiffs' Claim

While cognizant that the issue before us is not one of first impression and that the weight of authority as expressed in prior tax court and reviewing court decisions favors the defendant's position, we believe that the issue warrants reevaluation in light of the United States Supreme Court opinion in *Bob Jones University v. United States*, ____ U.S. ____, 103 S.Ct. 2017 (1983).

In *Bob Jones University*, the Supreme Court addressed the issue whether the university was entitled to a tax exemption under Section 501(c)(3) of the Internal Revenue Code as a "corporation . . . organized and operated for religious, charitable . . . or educational purposes." The language of 501(c)(3) (defining charitable, religious and educational organizations exempt from income tax) is similar to that of Section 170 (defining organizations, contributions

to which may be deducted for income tax purposes) and § 2055(a)(2)[1] of the Code.

Recognizing the similarity between §§170 and 501(c)(3) the Court in *Bob Jones University* observed that since the two sections are closely related (both encourage the development of certain organizations through the grant of tax benefits) and since the language of the sections are in most respects identical, the Commissioner and the courts have applied many of the same standards in interpreting those sections.

The Court concluded that to the extent one section aids in ascertaining the meaning of the other, it is entitled to great weight. *Bob Jones University*, *supra*, 103 S.Ct. at 2026 n.10, citing *United States v. Stewart*, 311 U.S. 60, 64-65 (1940).

As applied to this case, the Court's discussion of the term "charitable" in the context of § 501(c)(3) is entitled to

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[1]Section 2055. Transfers for public, charitable, and religious uses.

(a) In general. For purposes of tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers—

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office; . . .

"great weight" in interpreting the nearly identical language of § 2055(a)(2).[2]

In *Bob Jones University* the Supreme Court opined that congress, in enacting § 170 and § 501(c)(3), "sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind." *Bob Jones University*, *supra*, 103 S.Ct. at 2026.

"Tax exemptions for certain institutions thought beneficial to the social order of the country as a whole, or to a particular community are deeply rooted in our history . . . The origins of such exemptions lie in the special privileges that have long been extended to charitable trusts." *Id.*

The Court further stated that when analyzing § 501(c)(3) within the framework of the Internal Revenue Code, the background of Congressional purposes "reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy." *Id.*

Since the Congressional purposes underlying charitable exemptions are the same as those underlying the Code sections dealing with charitable deductions (encouragement of certain institutions through tax benefits) it follows

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[2]As all statutory sections are subject to the same definition of "charitable," treasury regulations promulgated under § 501(c)(3) and § 170 which address the definition of "charitable" are also relevant to the definition of "charitable" under § 2055(a)(2).

that institutions under those sections dealing with charitable deductions must also meet common law standards of charity.

We thus turn to the common law and law of charitable trusts to determine whether a public non-profit cemetery is a corporation organized and operated exclusively for charitable purposes.

It has long been followed that a charitable use "may be applied to almost anything that tends to promote the well-being of social man." *Ould v. Washington Hospital for Foundlings*, 95 U.S. 303, 311 (1878).

Lord MacNaghten, in a restatement of the English law of charity, long recognized as a leading authority in this country stated:

> Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty: trusts for the advancement of education: trusts for the advancement of religion: and *trusts for other purposes beneficial to the community, not falling under any of the preceding heads*.

Commissioners v. Pemsel [1891] A.C. 531, 583 (emphasis added). It is especially noteworthy that this "public benefit" element of charity was recognized in the estate tax area. In footnote 15 of its opinion in *Bob Jones University*, the Court points out that in 1924 the Solicitor of Internal Revenue looked to the common law of charitable trusts in construing § 403(a)(3) of the Revenue Act of 1918. That section is a predecessor to § 2055(a)(2) and contains similar language. The Solicitor's view of the charitable deduction section was that "generally bequests *for the benefit and advantage of the general public are valid as charities.* Sol. Op. 159, III-1 C.B. 480 (1924). (Emphasis added).

The plaintiffs' view, therefore, that the Verona Cemetery, a public non-profit cemetery, is "charitable" under Section 2055(a)(2) because it provides a benefit to the general public, is not without precedent.

This view is in stark contrast to prior court decisions wherein courts have consistently equated "charitable" solely with the relief of poverty. *See*, e.g., *Wilber Bank of Oneonta v. Commissioner of Internal Revenue*, 17 B.T.A. 654 (1929) (poor not given lots or grave sites so not for charitable purposes), *Gund's Estate v. Commissioner of Internal Revenue*, 113 F.2d 61 (6th Cir. 1940) (no free burial space was ever provided nor less than fair value ever charged for burial or upkeep), *Bank of Carthage v. United States*, 304 F. Supp. 77 (W.D. Mo. 1969) (not a charitable organization since cemetery charged for the lots, treated rich and poor alike and did not provide free burial space for the poor), *Child v. United States*, 540 F.2d 579 (2d Cir. 1976) (cemetery did not make a practice of providing free burial services to indigents), *First National Bank of Omaha v. United States*, 681 F.2d 534 (8th Cir. 1982) (perpetual care trust fund would not benefit the poor).

We believe this view of what is "charitable" is much too narrow and is also inconsistent with the principle of charitable trust law that the definition of "charity" depends upon contemporary standards. *See*, e.g., RESTATEMENT (SECOND) OF TRUSTS, § 374, comment a (1959); G. BOGERT & BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 369, at 65-67 (rev. 2d ed. 1977); IV A. SCOTT, THE LAW OF TRUSTS § 368, at 2855-2856 (3d ed. 1967).

We think a much more contemporary view of "charity" considers the benefit to the community as a whole. The maintenance of cemetery facilities by cemetery

associations benefits the community both through its aesthetic effects and by the performance of a necessary social task. *Child, supra*, (Anderson, J., dissenting).

Furthermore, were it not for public non-profit cemetery associations, responsibility for burial of the dead "would descend upon the public," i.e., on local municipalities. *Dulles v. Johnson*, 273 F.2d 362, 366 (2d Cir. 1959) *cert. denied*, 364 U.S. 834 (1960). The upkeep of the cemetery would also ultimately become the responsibility of the local government. It is anticipated the Verona Cemetery endowment fund will carry the cemetery for approximately twenty years. Afterwards, public contributions or municipal assumption of the operating costs will be necessary to continue the cemetery's operation.[3]

Thus to the extent that the cemetery is funded to avoid neglect and possible borough intervention the burdens of government are lessened. Treasury regulations which define "charitable" for purposes of Section 501(c)(3) expressly recognize that activities "lessening the burden of government" may bring an organization within that definition. U.S. Treas. Regs. § 1.501(c)(3)-1(d)(2).

Additionally,

> "Appropriate burial and care of the remains of deceased persons are important as a matter of sanitation. Marked graves, with data as to the date of birth and death and ancestry, frequently constitute valuable aids to the courts and other agencies of government in disposing of the rights of the living."

BOGERT, TRUSTS AND TRUSTEES § 377 p. 1197.

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[3] § 47804 of the Borough Code provides for maintenance of neglected cemeteries. PA. STAT. ANN. tit. 53, § 47804 (Purdon 1966).

Contrary to the view that the only persons who benefit from gifts to the cemetery are lot owners is the fact that the community regards the cemetery as publicly owned. Yearly Memorial Day services performed at the cemetery encourage both patriotism and a feeling of community. *See* RESTATEMENT (SECOND) OF TRUSTS, §374 comments e & f.

The numerous tax benefits already enjoyed by the Verona Cemetery are also indicative of official encouragement and recognition of the beneficial nature of non-profit public cemeteries. (*See* discussion under *Existing tax exemptions, supra.*)

A corollary to the public benefit principle is the requirement that the purpose of the charitable organization not be illegal or violate public policy. *Bob Jones University*, 103 S.Ct. at 2028. As stipulated, the Verona Cemetery is open to anyone without regard to race or religion. The cemetery is not operated for profit and no part of the net earnings inure to the benefit of any private individual.

We therefore reach the inevitable conclusion that contemporary society considers public non-profit cemeteries as charitable organizations because of the important social function they perform and the concurrent lessening of the burden of the public fisc.

Finally we address and reject the argument that since Congress specifically referred to cemetery companies under § 170(c)(5) and § 501(c)(13) but did not provide the same specific reference under § 2055(a), that this was an express indication of Congressional intent not to consider cemeteries as charitable under § 2055(a).

Clearly the intent of § 170(c)(5) and § 501(c)(13) was to encourage the organization of non-profit cemeteries

through the grant of tax benefits to the cemetery companies and their contributors. It is quite a contradiction to encourage gifts under § 170 but discourage bequests by denying an estate tax deduction under § 2055(a)(2). Whether the contribution is a gift given during one's lifetime or a bequest after one's death should be irrelevant. The desirable end result is the encouragement of gifts to non-profit cemeteries and the resultant benefit to the community.

We therefore conclude that the Verona Cemetery is a corporation organized and operated exclusively for charitable purposes under § 2055 (a)(2), and that the Estate of A. Leon Davis is entitled to a charitable deduction for the bequest.

An order follows.

. . /s/ BARRON P. MCCUNE . . .
Barron P. McCune
United States District Judge

Dated: June 26, 1984.

ORDER

AND NOW, June 26, 1984, in accordance with the preceding memorandum, plaintiffs' cross motion for summary judgment is granted.

Defendant's motion for summary judgment is accordingly denied.

. . /s/ BARRON P. MCCUNE . . .
Barron P. McCune
United States District Judge

APPENDIX C

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

In Re: Estate of A. Leon Davis, deceased

No. 5487 of 1976

OPINION

ZAVARELLA, Administrative Judge NOVEMBER 18, 1982

A. Leon Davis, a resident of the Borough of Oakmont, Allegheny County, Pennsylvania, died testate. His Last Will dated October 11, 1972 and Codicil thereto dated November 21, 1975 provided for certain bequests of personal property and cash with the residue of his estate being distributed as follows:

> "All of the rest, residue and remainder of my estate I give, devise and bequeath to THE VERONA CEMETERY, Oakmont, Pennsylvania, with the sum of Thirty Thousand Dollars ($30,000.00) thereof to be applied toward the erection of a new utility building and the balance thereof to be added to its Endowment Fund."

After payment of the bequests, expenses of administration and other estate obligations, a balance of approximately $325,000 remains for distribution.

The Commonwealth of Pennsylvania at the audit hearing presented an inheritance tax claim of $56,370.08 on this residuary estate. This claim was denied by the estate, thus presenting the question involved whether the Verona Cemetery, a Pennsylvania nonprofit corporation,

does qualify as a corporation organized and operated exclusively for religious or charitable purposes within the meaning of Section 302 of the Inheritance and Estate Tax Act of 1961.

The Verona Cemetery was first established in 1881 as an association for a public cemetery. In 1882 a nonprofit corporation decree was entered and a corporate charter issued. The corporation was organized on a nonprofit basis and none of the assets of the corporation have or may inure to the benefit of individuals. The corporation has operated the cemetery since that time as a public cemetery without restriction as to race and religion. There are approximately 84,000 [sic] burial plots in the cemetery, and as of 1981 all plots had been sold. There is practically no possibility of developing any substantial additional burial plots. In August of 1979, a chapel was constructed, partly with the $30,000 bequest, the chapel now being used without charge by all religious denominations for funeral services for those being buried in the cemetery. The cemetery is not owned by government or any religious organization and any religious ceremonies performed in connection with burial are performed by clergymen not associated with the cemetery. There is no religious supervision.

The cemetery is exempt from federal income tax and is also exempt from county and local real estate tax. There is no realty transfer tax imposed upon the sale of burial plots. The cemetery has received a tax exemption for state sales tax. Revenue to the cemetery comes from the sale of gravesites, grave openings, endowment charges of $50.00 per gravesite, mowing charges, charges for constructing headstone foundations, trust income of $400.00 a year, and deed transfer charges. Expenses consist of wages for the superintendent and part-time employees, office

expenses, building maintenace, a $100.00 per month salary for the secretary, restoration expenses and equipment. None of the officers, board members or corporators are compensated.

From the beginning of the cemetery until 1948, maintenance was provided exclusively from current revenue. The endowment which was established in 1937 was to provide income for maintenance after all gravesites had been sold. The excess of current revenue over current expenses was transferred to the endowment fund. Following 1964, however, the cemetery borrowed substantial funds from the endowment fund to handle a cumulative deficit. There were other funds borrowed from the endowment fund, however, all loans have been repaid. The income of the endowment fund, however, has been insufficient to cover maintenance and operating costs. After the sale of the possible additional sixty lots, the endowment fund will pay all costs. It is anticipated that the endowment fund will carry the cemetery for approximately twenty years and afterwards either public contributions or municipal assumption of the operating costs will be necessary to continue the cemetery's operation. As to indigent persons, it is not known whether the cemetery in the past provided free or reduced rates for burial plots to an indigent, however, in recent years it may be said that the corporation has no established practice which either authorizes or denies free or reduced rates to an indigent. These services have not been offered or requested. There have been grave openings ordered and provided, but not paid for.

All of these facts were made part of the record by stipulation. The denial of the application for charitable exemption by the Register of Wills was also made part of

the record, together with the notice of the estate to have the correctness of the denial determined at the audit.

It is the estate's contention that the legacy and devise qualifies for the charitable tax exemption pursuant to Section 302 of the Act. The Commonwealth contends that a church related or church owned cemetery qualifies as religious or charitable, but other cemeteries do not. Federal law that a nonreligious cemetery cannot qualify is cited as all of the federal cases were decided under virtually identical provisions of similar legislation. Moreover, the Commonwealth contends that while this cemetery is public in the sense that it is open to all persons, the owners of the lots are private individuals who have chosen to pay the fees to be interred in the cemetery. The bequest by the decedent rather than benefiting the public at large thus benefits only the private individuals who have chosen to be interred at the cemetery. Failure of the cemetery to demonstrate that it has provided for the burial of indigents without charge or at a reduced fee is fatal to the charitable exemption request. And finally, the Commonwealth contends that statutes granting exemptions from taxation must be strictly construed against the person claiming the exemption. This latter contention appears to be at odds with the principle that taxing statutes are to be strictly construed. For the following reasons, the contention of the estate will be accepted. It will be determined that no entity or individual profits by the operation of the cemetery and the general public benefits from its existence.

The Probate, Estates and Fiduciaries Code, Section 6101, states:

> "'CHARITY' OR 'CHARITABLE PURPOSES'. Includes but is not limited to the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community."

This definition is from Restatement, Trusts 2d, Section 368:

> "Charitable purposes include
> (a) the relief of proverty;
> (b) the advancement of education;
> (c) the advancement of religion;
> (d) the promotion of health;
> (e) governmental or municipal purposes;
> (f) other purposes the accomplishment of which is beneficial to the community."

See also Section 374:

> "A trust for the promotion of purposes which are of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to their accomplishment is charitable."

Comment (h) states:

> "A gift of property with a direction to apply it to the erection or maintenance of a tomb or monument ordinarily does not create a charitable trust. If, however, it is to be a part of the fabric of a church, or if it is to commemorate a notable person, a charitable trust is created and is valid even though the income of the property is to be applied forever for its maintenance. So also, a provision for the maintenance of a grave does not create a charitable trust. *But a trust for the maintenance of a public cemetery or a churchyard is charitable.*"
> (emphasis added)

In *Hill School Tax Exemption Case*, 370 Pa. 21, 87 A. 2d 259 (1952), the Supreme Court stated:

> "The word 'charitable' in a legal sense includes every gift for a general public use, to be applied consistent with existing laws, for the benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical, or social standpoint. In its broadest meaning it is understood 'to refer to something done or given for the benefit of our fellows or of the public.' "
>
> . . . .
>
> "Charitable uses may be unlimited in number and are not to be determined by the application of any narrow criterion . . . . A design to achieve objects beneficial to the community is common to all charitable purposes . . . . The concept of charity is continually broadening." p. 25

The Commonwealth makes much of the fact that the cemetery sells the burial plots. The bequest to the cemetery, according to the Commonwealth, benefits only the private individuals who have paid the purchase price of the grave lots. It thus considers the cemetery to not be charitable.

In the sense of purely public, the word "purely" in a constitutional sense means that the institution must be entirely free from private profit motive. "A purely public charity does not cease to be such where it receives some payment for its services." *Hill School*, p. 27. Also, *American Society for Testing and Materials v. Board of Revision of Taxes*, 423 Pa. 530, 225 A.2d 557 (1967).

In *In re: Appeal of Marple Newton School District*, 46 Pa. Cmwlth. 80, 405 A.2d 1351 (1979), the Commonwealth asserted that a residence for senior citizens was not tax-exempt. Its argument was because the residents were financially secure and paid a substantial entry fee as well as a monthly care fee, the home was not a charity.

In holding that the residence was a charity, the Court stated:

> "Equally well established is that the charitable exemption of a home for senior citizens is not negated merely because residents pay for the services they receive." *Marple Newton*, supra, 46 Pa. Cmwlth. at 86, 405 A.2d 1353.

Quoting from *In re: Tax Appeals of the United Presbyterian Homes of the Presbytery of Huntingdon*, 428 Pa. 145 at 154, 236 A.2d 776 at 780 (1968):

> "To adopt this argument of the appellants would require us to hold that whenever a nonprofit institution made a charge for its care or services to any resident or patient, the institution would be precluded from obtaining tax exemption. Consequently, hospitals which charge large sums for the care of and services to paying patients, and colleges and universities which charge tuition to countless students, would not be entitled to real estate tax exemption. This interpretation and result is not required by the language or spirit of the Constitution of Pennsylvania or . . . the decisions of this Court."

The Commonwealth Court's determination that the senior citizen residence was "free from private profit motive" was based on facts similar to this matter. The Court cited the home's failure to realize a profit in any given year and its substantial operating loss in one year.

Most significantly, the Court found that all fees paid by the residents were used to pay operating expenses or to improve the facilities and were not used to benefit any individual or entity operated for private profit. This is the same procedure followed at the Verona Cemetery.

In *Gingrich v. Blue Ridge Memorial Gardens*, 444 Pa. 420, 282 A.2d 315 (1971), the Supreme Court considered the right of a religious, charitable, tax-exempt cemetery to sell cemetery markers and monuments for profit. In finding that such action was not barred by the cemetery's tax-exempt status, the Supreme Court stated:

> "The fact that the Diocese may receive a profit from the sale of markers and monuments does not detract from the charitable nature of the trust. It has been well stated: '*The question is not whether the institution may receive a profit, but what disposition is to be made of the profit, if any, which may be received. If the profits are to inure to the benefit of individuals, the institution is not charitable, but if the profits, if any, are to be applied wholly to charitable purposes the institution is charitable*': *Scott on Trusts*, VOL. IV, p. 2967 (1967)." **(emphasis added)**

In the instant matter, as in *Gingrich*, there is nothing of record, nor are there any allegations that any proceeds from the sale of the burial plots go other than to the care and maintenance of the cemetery.

Stipulation 8 provides in part as follows:

...

> "The income of the Endowment Fund has been insufficient to cover maintenance and operating costs. In 1979 that income was $11,985.00, considerably less than that required for expenses. Approximately 2/3 of

> the proceeds from lot sales in that year were utilized to make up this deficit and that was one of the best years. Over the five-year period from 1976 through 1980, more than 80% of the lot charges were absorbed by current maintenance and operation expense. For 1980 the percentage was 94%. After the sale of the aforementioned 60 lots, the Endowment Fund will bear the full brunt of these costs. Without the infusion of new funds from the A. Leon Davis Estate, the entire current Endowment Fund of approximately $211,000.00 would have been fully depleted by .his expense drain in approximately 20 years. After that a public contribution campaign or municipal assumption of the operating costs and responsibilities would have been the only alternative to abandonment of the cemetery."

Stipulation 9 is as follows:

> "9. *Other Cemeteries.* The nearest public cemetery to The Verona Cemetery is six (6) miles distant. Neither the Borough of Oakmont in which it is located nor any of the contiguous municipalities maintains a public cemetery. Some time ago the Borough of Oakmont was forced, through lack of support by others, to take over the maintenance of the Bright family burial ground situate within that borough. At best, that maintenance consists of mowing of the grass with nothing more being done."

Section 47804 of the Borough Code provides for borough maintenance in certain circumstances of negleted cemeteries. 53 P.S. 47804. Thus, to the extent that the cemetery is funded so as to avoid neglect and possible borough intervention, the burdens of government are lessened. Moreover,

"Appropriate burial and care of the remains of deceased persons are important as a matter of sanitation. Marked graves, with data as to the date of birth and death and ancestry, frequently constitute valuable aids to the courts and other agencies of government in disposing of the rights of the living."

Bogert, Section 377, p. 1197.

Granted it can only be stated that the Borough of Oakmont could eventually maintain the cemetery, that maintenance would be at the expence of the public. The cemetery thus functions in the nature of a public charity. *American Society for Testing and Materials v. Board of Revision of Taxes*, 423 Pa. 530, 225 A.2d 557 (1967). The care and maintenance of a neglected cemetery is not something that government should avoid.

The Commonwealth also contends the cemetery fails affirmatively to provide for the free burial of indigents and this failure evidences that the cemetery is not a charity.

This contention will not be accepted. First, the cemetery has not been requested to provide free or at reduced rates, a burial plot or grave opening for indigents. (S-12) Second, the cemetery has no policy or practice which either authorizes or denies free or reduced rate service to indigents. (S-12) On several occasions, the cemetery has provided grave openings and subsequently was not paid for this service, allegedly because of lack of funds. (S-12) Charity is not limited to the relief of the poor. Nowhere is there Pennsylvania authority for such a narrow interpretation.

The authorities are contrary:

Scott on Trusts, 3rd edition:

"The bequest for the upkeep of a public cemetery or a cemetery attached to a church is a charitable trust." P. 948.

Bogert, Trusts and Trustees, section 377.

Presbyterian Home Tax Exemption Case, 428 Pa. 145 (1965):

"Moreover, it is a matter of wide common knowledge in which we gladly participate that the public or general welfare policy of Pennsylvania has been increasingly broadened to include greater and greater concern and care for the aged and the sick and the infirm, and consequently the words 'charity' and 'public charity' must be given a liberal interpretation." p. 152.

The same liberal interpretation should be due the dead. Their resting place is hallowed ground. *Brown v. Lutheran Church*, 23 Pa. 495 (1854).

The law considers the question herein involved to be a mixed question of law and fact. A charitable use is not easy to define and prior cases may have little value as precedent but here, because the Verona Cemetery does not operate on a profit basis and because Pennsylvania law supports the use of funds theory rather than the source of funds (the funds in this matter would never go to an individual or to a corporation operated for private profits), the Commonwealth's claim for inheritance tax will be denied. To follow *Child v. United States*, 540 F.2d 579, as urged by the Commonwealth, would be to adopt a restrictive view of charity which is contrary to the law of Pennsylvania.

ORDER OF COURT

ZAVARELLA, A.J.

AND NOW, this 18th day of November, 1982, the bequest and devise to The Verona Cemetery is ORDERED exempt from the Pennsylvania Transfer Inheritance Tax. The claim of the Commonwealth for this tax is denied.

Per Curiam

/s/ ZAVARELLA .....

ORDER OF COURT

ZAVARELLA, A.J.

AND NOW, this 19th day of November, 1982, it is hereby ORDERED AND DECREED that the Opinion filed in this matter on November 18, 1982 be amended to indicate on page 2 the number of burial plots to be 8,400.

Per Curiam

/s/ ZAVARELLA .....

OPPOSITION

BRIEF

No. 85-459

In the Supreme Court of the United States

OCTOBER TERM, 1985

MELLON BANK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the court of appeals' decision that an estate, in computing its federal estate tax, is not entitled to a charitable contribution deduction for a bequest to a nonprofit cemetery association.

1. Petitioners are the executors of the estate of A. Leon Davis, who died on December 6, 1976. His will made a substantial bequest to the Verona Cemetery in Oakmont, Pennsylvania. The cemetery is managed by the Verona Cemetery Association, whose stated purpose is the maintenance, without profit, of a public cemetery. It is not affiliated with any religious or governmental organization. It has 8,490 burial plots, all of which have been or will be sold, and a chapel, which is used by various religious denominations for funeral services (Pet. App. 2a). The cemetery receives its revenues mainly from the sale of grave sites, charges for grave openings, lawn mowing fees, charges for

headstone foundations, and fees for burial of cremation ashes (*ibid.*). The cemetery does not have any established practice of providing free or reduced-rate services for indigents (*id.* at 2a, 4b).

In 1941, the IRS notified the cemetery (C.A. App. 35) that it qualified for exemption from federal income tax under the predecessor of Section 501(c)(13) of the Internal Revenue Code.[1] That Section provides a tax exemption for "[c]emetery companies * * * not operated for profit," so long as "no part of [their] net earnings * * * inures to the benefit of any private shareholder or individual." The cemetery remained tax-exempt under Section 501(c)(13) at the time the decedent made his bequest in 1976 (Pet. App. 3a).

After filing its federal estate tax return, the estate filed a claim for refund asserting that it was entitled to a deduction of $370,902 for the decedent's bequest to the cemetery. Petitioners based this claim on Section 2055(a)(2) of the Code, which permits a deduction against the gross estate for bequests to or for the use of "any corporation organized and operated exclusively for religious, charitable [or other specified] purposes." Following denial of their refund claim, petitioners brought this refund suit in federal district court (Pet. App. 1a).

The district court granted summary judgment for petitioners. It held that the term "charitable" as used in Section 2055(a)(2) should be read to apply broadly to any activities that result in a "benefit to the community as a whole" (Pet. App. 9b). The court reasoned that the operation of a cemetery "benefits the community both through its aesthetic effects and by the performance of a necessary social task,"

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as in effect for the period at issue (the Code or I.R.C.).

since in the absence of privately-run cemeteries the government would have to provide a place for burials (*id.* at 10b). The court acknowledged that "the weight of authority" as expressed in prior judicial decisions supported the Commissioner's view, but believed that "the issue warrants re-evaluation" (*id.* at 5b) in light of this Court's decision in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983).

The court of appeals reversed, one judge dissenting (Pet. App. 1a-12a). It noted that " 'charitable' " organizations and " '[c]emetery companies * * * not operated for profit' " have always been accorded distinct treatment for federal tax purposes (Pet. App. 4a-5a, quoting I.R.C. § 501(c)(3) and (13)). The court observed, moreover, that Congress has never made available for bequests to cemetery companies the estate-tax deduction that Section 2055(a)(2) makes available for charitable bequests (Pet. App. 6a). The court rejected petitioners' argument that the statute would be unconstitutional as applied if interpreted to deny a deduction for bequests to privately-run cemetery companies, while permitting a deduction for bequests to religious cemeteries (*id.* at 8a-9a). The court concluded that the statute had a rational basis and did not have the primary effect of advancing religion, and hence did not violate equal protection or First Amendment principles (Pet. App. 7a-9a).

2. As petitioners concede, the decision below is consistent with the decisions of every other court of appeals that has considered the issue. See Pet. 6 & n.7 (citing cases). This Court has repeatedly denied certiorari on that question. *E.g.*, *First Nat'l Bank of Omaha* v. *United States*, 681 F.2d 534 (8th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); *Child* v. *United States*, 540 F.2d 579 (2d Cir. 1976), cert. denied *sub nom. Nat'l Bank of Northern New York* v. *United States*, 429 U.S. 1092 (1977). There has been no change in the relevant statutes since certiorari was denied in these

earlier cases. As we explained in our briefs opposing certiorari there, the statutory and constitutional arguments that petitioners advance are meritless, and the court of appeals correctly rejected them.[2]

While acknowledging the force of these earlier decisions, petitioners (Pet. 8-10), following the district court (Pet. App. 5b-9b), argue that a different result is required by *Bob Jones University* v. *United States*, 461 U.S. 574 (1983). The Court there upheld (*id.* at 579) the IRS's position that private schools with racially discriminatory admissions policies are not "charitable" organizations and hence do not qualify for tax exemption under Section 501(c)(3). The Court noted the traditional definition of the term "charitable" under common law (461 U.S. at 586-591) and concluded that, "to warrant exemption under § 501(c)(3), an institution * * * must demonstrably serve and be in harmony with the public interest * * * [and the institution's] purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred" (461 U.S. at 592 (footnote omitted)).

The *Bob Jones* decision is of no help to petitioners. The Court there held that an organization *is not* charitable if its purposes violate public policy and it thus fails to confer a benefit on the community at large. It does not follow from that premise that an organization *is* charitable if the converse situation holds; elementary logic teaches that the contrapositive of a true statement is not necessarily true. The fact is that the cemetery to which the decedent made his bequest has been recognized as tax-exempt by the IRS as a "[c]emetery compan[y] * * * not operated for profit" within the meaning of Section 501(c)(13), not as a "charitable"

[2]We are providing copies of our briefs in the cited cases to petitioners' counsel.

organization within the meaning of Section 501(c)(3). Under the statutory scheme that Congress has established, the mere fact that a cemetery company runs a cemetery is insufficient to make it a "charitable" organization. And petitioners have shown no other ground—such as "[r]elief of the poor" (Treas. Reg. § 1.501(c)(3)-1(d)(2))—that would enable the instant cemetery to qualify as a "charitable" organization. The decedent's bequest to that cemetery accordingly cannot qualify for the estate-tax deduction provided by Section 2055(a)(2) for transfers "to or for the use of any corporation organized and operated exclusively for * * * charitable * * * purposes," and nothing in *Bob Jones* is to the contrary.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

MELLON BANK ET AL. *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-459. Decided February 24, 1986

The petition for writ of certiorari is denied.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE POWELL join, dissenting.

The Internal Revenue Code allows a deduction from the taxable estate of bequests "to or for the use of any corporation organized and operated exclusively for . . . charitable . . . purposes." 26 U. S. C. §2055(a)(2). This petition presents the question whether a bequest to a nonprofit cemetery association qualifies for a deduction pursuant to this section.

A. Leon Davis died testate on December 6, 1976. His will provided that the residue of his estate was to be distributed to the Verona Cemetery in Oakmont, Pennsylvania. The cemetery was established by nearby residents in 1881 as a nonstock, nonprofit corporation for the purpose of providing burial space to any person regardless of religion or race. Davis' executors filed a federal estate tax return, paid the tax, and then submitted a claim asserting a charitable deduction of $370,901.74, the total amount distributed to the cemetery. The Internal Revenue Service disallowed the deduction and denied the accompanying claim for a refund. After exhausting administrative remedies, the executors instituted the present refund action in Federal District Court. Concluding that Verona Cemetery was a "corporation organized and operated exclusively for . . . charitable . . . purposes," 590 F. Supp. 160, 162, n. 1 (WD Pa. 1984), the District Court held that the bequest qualified for a deduction under §2055(a)(2). In reaching that conclusion, the court observed

that the cemetery was exempt from federal income taxes, that the bequest had already been held exempt from Pennsylvania's inheritance tax and, more generally, that bequests to public nonprofit cemetery associations traditionally had been considered charitable under the common law of trusts.

A divided panel of the Court of Appeals for the Third Circuit reversed. 762 F. 2d 286 (1985). It acknowledged the "anomaly" of treating nonprofit cemetery associations differently for federal estate and income tax purposes. It believed, however, that this asymmetry was compelled by the language and history of the relevant provisions of the Code. Employing language that closely parallels § 2055(a)(2), § 501(c)(3) exempts from federal income taxes "[c]orporations . . . organized and operated exclusively for . . . charitable . . . purposes." Since 1913, the Code has included a separate exemption for "[c]emetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit." 26 U. S. C. § 501(c)(13). In 1954, as part of the general revision of the Code, Congress enacted § 170(c)(5), which permits deductions of contributions to any cemetery company that meets a standard virtually identical to that set out in § 501(c)(13). After examining this history, the Court of Appeals concluded that nonprofit cemetery companies did not qualify as a "charitable" corporation under § 2055(a)(2). Because Congress had thought it necessary to enact a special provision for cemeteries on the income tax side, the court reasoned, it must have believed that such entities were not within the general deduction for "charitable" contributions. 26 U. S. C. § 170 (c)(2)(B). Thus, the court concluded, the failure to adopt a parallel provision on the estate tax side foreclosed petitioner's contention that cemetery associations qualified as "charitable" within the meaning of § 2055(a)(2).

This reasoning is far from inevitable. That Congress explicitly provided for nonprofit cemetery associations in § 501(c)(13) and § 170(c)(5) does not lead inescapably to the

conclusion that many such associations are not within the more general exemption for "charitable" corporations. Some family cemetery corporations, for example, are covered by § 501(c)(13) but almost certainly would not qualify as "charitable" within the more general language of § 501(c)(3). See *John D. Rockefeller Family Cemetery Corp.* v. *Commissioner*, 63 T. C. 355 (1974). Congress clearly intended to confer on these private cemetery associations an exemption from federal income taxation. *Id.* The nearly identical language of § 170(c)(5) suggests that Congress also intended that contributions to such associations be tax deductible. But it does not inevitably follow that public organizations that already qualified as "charitable" suddenly ceased to be so by virtue of a decision to afford a tax benefit to some organizations that could not meet this more restrictive requirement. This construction is especially unlikely in light of the virtually uniform consensus under state common and statutory law that nonprofit, public cemetery associations are "charitable" and that bequests to such organizations are therefore exempt from inheritance taxes. See, *e. g.*, *In re Estate of Edwards*, 88 Cal. App. 3d 383, 151 Cal. Rptr. 770 (1979). See also Restatement (Second) of Trusts § 374, Comment *h* (1959).

I recognize that the Court of Appeals' analysis conforms with that of other federal courts that have considered the issue. See, *e. g.*, *Child* v. *United States*, 540 F. 2d 579, 584 (CA2 1976). I recognize also, in the words of the dissenting judge below, that "[t]he Republic will stand" regardless of how this issue is resolved. 762 F. 2d, at 287. Nonetheless, because the Court of Appeals' construction of the Code will have a significant impact on the financial vitality of these organizations and because I am unconvinced that this anomalous construction is justified by the language and history of the relevant provisions of the Code, I would grant the petition for certiorari.